

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UMG RECORDINGS, INC., CAPITOL RECORDS, LLC,) AU:17-CV-00365-LY
WARNER BROS. RECORDS INC., SONY MUSIC)
ENTERTAINMENT, ARISTA RECORDS LLC, ARISTA)
MUSIC, ATLANTIC RECORDING CORPORATION,)
CAPITOL CHRISTIAN MUSIC GROUP, INC., ELEKTRA)
ENTERTAINMENT GROUP INC., FONOVISA, INC.,)
FUELED BY RAMEN LLC, LAFACE RECORDS LLC,)
NONESUCH RECORDS INC., RHINO ENTERTAINMENT)
COMPANY, ROADRUNNER RECORDS, INC.,)
ROC-A-FELLA RECORDS, LLC, TOOTH & NAIL, LLC,)
ZOMBA RECORDING LLC,)

Plaintiffs,)

v.)

AUSTIN, TEXAS)

GRANDE COMMUNICATIONS NETWORKS LLC,)
PATRIOT MEDIA CONSULTING, LLC,)

Defendants.)

JANUARY 3, 2018)

TRANSCRIPT OF INITIAL PRETRIAL CONFERENCE
BEFORE THE HONORABLE LEE YEAKEL

APPEARANCES:

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24 Proceedings recorded by computerized stenography, transcript
25 produced by computer.

15:01:52 1 (In chambers)

15:01:52 2 THE COURT: Let's start here at my left, and announce
15:01:54 3 again who you are and who you represent so the court reporter
15:01:57 4 can get you down.

15:01:58 5 MR. BITTING: I'm Dan Bitting. I represent the
15:02:00 6 plaintiffs.

15:02:02 7 MR. O'BEIRNE: Phil O'Beirne, also on behalf of
15:02:06 8 plaintiffs.

15:02:07 9 MR. RAVEL: Steve Ravel for the defendants Grande and
15:02:11 10 Patriot.

15:02:11 11 MR. HOWENSTINE: And Zachary Howenstine, also for
15:02:14 12 defendants.

15:02:18 13 THE COURT: Okay. For those of you haven't been here
15:02:34 14 before and for those of you who have, this is what I call an
15:02:37 15 initial pretrial conference or a scheduling conference. And
15:02:40 16 the most important thing we are going to accomplish in this
15:02:44 17 case today is to get you a date and time for your final
15:02:49 18 pretrial conference and a trial month in which to have your
15:02:53 19 jury trial.

15:02:54 20 And I can do no better than give you a trial month
15:02:58 21 because my civil docket is held hostage by my criminal docket;
15:03:04 22 and until I know what criminal cases I'm going to have to try
15:03:07 23 in any given month, I don't know what dates and times I'm going
15:03:16 24 to have available for my civil docket.

15:03:19 25 But your final pretrial conference will come late in

15:03:21 1 the month before your trial month, and it will come after I
15:03:29 2 have called my criminal docket for your trial month. So, at
15:03:33 3 the absolute latest, I should be able to give you a date and
15:03:36 4 time for your jury trial when you come for your final pretrial
15:03:39 5 conference.

15:03:40 6 In other words, you're not going to be put on what
15:03:42 7 some judges call a trailing docket, where we go into your trial
15:03:46 8 month and you're on 24- or 48-hour call. You will get a
15:03:51 9 specific date and time for your jury trial; it may just come a
15:03:56 10 little late in the hunt. That's not a perfect system, but it's
15:03:59 11 the best I can do with the docket that I have.

15:04:06 12 What it means also is: You and your clients and your
15:04:09 13 witnesses need to know that you have to hold that entire trial
15:04:12 14 month open until I'm able to give you a specific date and time.
15:04:21 15 It will not be grounds for a continuance or a postponement that
15:04:24 16 the month has become inconvenient for you or you have had a
15:04:27 17 client or a witness get out of pocket. So make sure they all
15:04:30 18 understand that.

15:04:31 19 Now, there is a way you can avoid that uncertainty,
15:04:34 20 and that is you can consent to a magistrate judge. And I want
15:04:41 21 all parties to take one of our consent forms that is in the
15:04:43 22 middle of table there.

15:04:46 23 Now, I'm not going to -- I don't lean on the lawyers
15:04:49 24 hard, like some of my colleagues do, to try to force you to
15:04:52 25 consent to a magistrate judge; but what I do require you to do

15:04:55 1 is to discuss this case among yourselves and with your clients.
15:05:02 2 As you know, it takes all parties to consent before I can
15:05:05 3 transfer a case to a magistrate judge for all purposes,
15:05:14 4 including trial and final judgment.

15:05:16 5 What do you get if you consent to a magistrate judge?
15:05:18 6 One, you get the thanks of the Court. I could not get to all
15:05:21 7 of my civil cases if I weren't able to transfer a portion of
15:05:26 8 them to a magistrate judge for all purposes, including trial
15:05:28 9 and judgment.

15:05:31 10 Secondly, you avoid the uncertainty in your trial
15:05:34 11 setting. The magistrate judge can and will give you a
15:05:38 12 specific, discrete date and time for your jury trial that you
15:05:43 13 can rely on just about as quickly as I transfer the case to
15:05:47 14 them. The way that would work is, once I get in consent forms
15:05:54 15 that indicate consent of all parties, I won't sit on the case.
15:05:58 16 I would immediately transfer it to the magistrate judge, who
15:06:01 17 would contact you and would, in consultation with you, come up
15:06:07 18 with a date and time that everybody can live with for your
15:06:10 19 trial.

15:06:12 20 Why can the magistrates do that and I can't do that?
15:06:15 21 Well, one, their dockets are much less complex and lengthy than
15:06:21 22 mine. For instance, the magistrate judges cannot try federal
15:06:25 23 felony cases, which means you are never in any danger of
15:06:28 24 getting bumped by a criminal case if you are before the
15:06:31 25 magistrate. You are always in that danger if you remain in my

15:06:35 1 court even after I give you a specific date and time for trial.
15:06:39 2 If something comes up in a criminal case, I'm just going to
15:06:42 3 have to handle it.

15:06:44 4 Also, by agreement with me, the magistrate judges do
15:06:48 5 not overbook, which means you are not ever going to be in a
15:06:52 6 situation where you are going to get a call saying a case ahead
15:06:55 7 of you on the docket is going to trial and you're not going to
15:06:58 8 be reached.

15:07:01 9 So, if the uncertainty of a trial setting and having
15:07:03 10 to hold an entire month open is a problem for you or your
15:07:07 11 clients, you should consider consenting to a magistrate judge.

15:07:11 12 Also, as you already know -- well, you don't already
15:07:15 13 know. Yeah, you do, because I've referred a couple of motions
15:07:18 14 to a magistrate judge already -- I'm likely to refer all or a
15:07:26 15 portion of your pretrial matters to a magistrate judge just
15:07:33 16 because of the size of my docket. So if you only want to
15:07:35 17 educate one judge, bring one judge up to speed, you might want
15:07:38 18 to consider consenting to a magistrate.

15:07:40 19 And, finally, in spite of what I have told you about
15:07:48 20 my docket, we do a good job of getting to our civil cases in
15:07:52 21 the month in which they are set. So, if you stay in my court,
15:07:55 22 you will be expected to be ready to go trial in the month we
15:07:59 23 put in the scheduling order. It will be almost impossible for
15:08:02 24 you to get a continuance. It creates far too big of a ripple
15:08:05 25 effect through my docket if I start trying to do things with it

15:08:13 1 as we approach the trial month, so I just don't. Again, the
15:08:17 2 magistrate judges are much more flexible than I and would be
15:08:20 3 willing to work with you on a reset or a continuance where I
15:08:22 4 wouldn't.

15:08:25 5 If one or all or any combination of the parties is
15:08:28 6 not going to consent to a magistrate judge, no one needs to
15:08:31 7 notify us of that. I'm going to sign a scheduling order today
15:08:37 8 and, unless and until I get consents from all parties, we are
15:08:40 9 going to proceed in my court under that scheduling order.

15:08:43 10 So, that having been said, the most important date
15:08:55 11 you have in your scheduling order, in spite of the 12(b)
15:08:57 12 motions, is your current dispositive motions deadline. So
15:09:00 13 everything I'm going to say from this point forward is going to
15:09:08 14 be effective, provided this case survives the current round of
15:09:11 15 motions.

15:09:12 16 And I'll say a little bit about dispositive motions,
15:09:18 17 in spite of the fact that there is some of them already filed,
15:09:19 18 is I don't care for dispositive motions. If I could pass one
15:09:22 19 law, it would be to do away with all dispositive motions for
15:09:32 20 all time, and you would either try your case or settle your
15:09:35 21 case. That's the way it used to be done, and I think it was a
15:09:39 22 better system.

15:09:40 23 But, if this case survives the previous round of
15:09:42 24 motions, let me tell you, if you feel compelled to file other
15:09:48 25 dispositive motions, do so only if in your best professional

15:09:56 1 belief there is a strong likelihood it can get granted.

15:10:00 2 Now, one of the reasons I dislike dispositive motions
15:10:02 3 is I get them in every one of my cases. They are the single
15:10:08 4 most time consuming thing that I do. I feel all of you are
15:10:17 5 experienced enough to know that, maybe at the outside, only
15:10:19 6 about half of all cases is there some form, legitimately, of
15:10:23 7 summary relief perhaps available. So, if I'm getting these
15:10:29 8 motions in every one of my cases, it sounds like half of them,
15:10:32 9 if you do the math, are frivolous, and that's certainly been my
15:10:35 10 experience.

15:10:37 11 But, because I get them in all of my cases and
15:10:42 12 because there will be anywhere from a high of maybe 20 to a low
15:10:45 13 of down around 10 civil cases moving along on the same time
15:10:49 14 line you're on, all with dispositive motions, and, because I
15:10:55 15 don't get the luxury my state court colleagues get of being
15:10:58 16 able to just say "granted" or "denied" -- I have to write a
15:11:01 17 complete opinion on a dispositive motion -- they take a good
15:11:08 18 long time to deal with. Also, I do not begin to look at
15:11:12 19 dispositive motions until I get in a response and a reply,
15:11:18 20 which takes about 30 days or a month.

15:11:21 21 So if you're looking at a dispositive motions
15:11:22 22 deadline of late July, I won't be looking at your motions until
15:11:25 23 late August. And, then, for all of the reasons that I've told
15:11:28 24 you, I need 90 to 120 days after that to deal with the motions.
15:11:34 25 So, if we go September, October, November, the earliest I would

15:11:41 1 be looking at setting you for final pretrial conference would
15:11:45 2 be in December and a jury trial in January.

15:11:52 3 So I start with the plaintiffs, not because I favor
15:11:55 4 the plaintiffs but I read from top to bottom and they come
15:11:59 5 above the "v," so that's an easy default. And I'm not trying
15:12:05 6 to slot you in December-January. I can go later than that, I
15:12:09 7 just can't go earlier than that for the reasons that I've
15:12:12 8 stated. So now is the time to think about your next winter's
15:12:15 9 docket. Don't forget your nonrefundable airline tickets for
15:12:24 10 the ski trips to Austria that you have scheduled for next
15:12:28 11 winter.

15:12:28 12 So I'll start with plaintiffs. How do you-all feel
15:12:29 13 about a December-January, time line to resolve this case?

15:12:35 14 MR. O'BEIRNE: Your Honor, Phillip O'Beirne for
15:12:37 15 Plaintiffs. We're in luck because I haven't scheduled the ski
15:12:40 16 trip yet. We expect to be ready to try the case, and we think,
15:12:44 17 if not sooner, we could be ready December-January.

15:12:48 18 THE COURT: How about the defendants?

15:12:49 19 MR. RAVEL: Your Honor, picking up on what you said
15:12:51 20 about dispositive motions and the magistrate and July 26th,
15:12:56 21 just putting in a minimum number of days, if it goes to
15:13:03 22 Judge Austin, it is unlikely for you to take zero time with
15:13:06 23 them to be done by January, February, maybe even March, because
15:13:13 24 of the two phases.

15:13:15 25 And so we would say, given that that is so and given

15:13:22 1 that you are setting some pretty, plain vanilla two-party cases
15:13:28 2 in April, May, June, that May-ish sounds right, April sounds
15:13:32 3 right, because these will be legitimate motions, if they're
15:13:41 4 filed, given what you've said and given the maturity of the
15:13:45 5 parties. And if we don't get rid of them on summary judgment,
15:13:48 6 we think there will be some impact on the charge, the evidence
15:13:50 7 that the parties are going to want to deal with.

15:13:53 8 So I -- I calculate the earliest time is around my
15:13:57 9 birthday, Ground Hog's Day, that you and Judge Austin would be
15:14:02 10 finished, and I'm building in a little time after that to get
15:14:05 11 us to April-ish.

15:14:08 12 THE COURT: All right. So you're suggesting that we
15:14:11 13 have a March pretrial and trial in April?

15:14:15 14 MR. RAVEL: Kind of at the earliest. And I know that
15:14:17 15 sounds, well, the pigs get fat, and the hogs get slaughtered.

15:14:19 16 THE COURT: Well, there's no earliest or latest
15:14:20 17 because I don't care. I have a lot of flexibility at the
15:14:25 18 beginning of a case. I have much less flexibility at the end
15:14:28 19 of a case. So right now, at this time, you-all pretty much can
15:14:34 20 tell me when you want to try the case and when you want to
15:14:37 21 agree on it, provided it's not earlier than that
15:14:39 22 December-January time line, and then I would be happy to
15:14:46 23 accommodate you there.

15:14:47 24 MR. RAVEL: Well, in these situations, even good
15:14:50 25 lawyers like Dan can plan as far ahead as May. But my twins

15:14:55 1 graduate college on the 18th and 19th, so, if we can avoid that
15:15:00 2 weekend, May works.

15:15:01 3 THE COURT: Everybody talk about it and tell me what
15:15:03 4 you want.

15:15:05 5 MR. BITTING: The other alternative is to back up the
15:15:07 6 dispositive motions deadline. I think we know what additional
15:15:11 7 dispositive motions may be coming.

15:15:14 8 MR. O'BEIRNE: Yeah, Your Honor. From our
15:15:15 9 standpoint, I mean, we think this is a straightforward case and
15:15:18 10 we're seeing in discovery already triable facts. So we may
15:15:21 11 have a motion on an affirmative defense that's been raised.
15:15:24 12 But to your point about narrow the issues of what you're
15:15:27 13 actually going to have legitimate motions about and then get to
15:15:31 14 the trial, you know, as the plaintiffs, we want to be ready to
15:15:34 15 go and we think we can go as soon as possible.

15:15:35 16 THE COURT: I understand that "may have a motion" is
15:15:37 17 just like saying "will have a motion" at this stage in the
15:15:40 18 case.

15:15:40 19 MR. RAVEL: It's not traditional to move an agreed
15:15:45 20 dispositive motions deadline earlier in the initial pretrial.
15:15:48 21 But we came in planning on that, and everything does march up
15:15:53 22 to that, the discovery deadline and the expert discovery
15:15:57 23 deadline. And it's bifurcated here.

15:16:00 24 THE COURT: Well, tell me what you-all can agree on.
15:16:03 25 All I'm looking for is a month for your final pretrial

15:16:06 1 conference and a month for your trial.

15:16:18 2 MR. RAVEL: April to May or May to June?

15:16:18 3 MR. BITTING: I'm fine with either of those.

15:16:18 4 MR. RAVEL: What?

15:16:18 5 MR. BITTING: I'm fine with either of those.

15:16:18 6 THE COURT: If you're going to have discussions you
15:16:19 7 don't want on the record, just tell her you don't want it on
15:16:21 8 the record. You don't have to whisper. She'll get it if you
15:16:27 9 whisper if I tell -- unless I tell her not to put it on the
15:16:28 10 record.

15:16:29 11 MR. HOWENSTINE: I think the issue is that the
15:16:31 12 defendants think sometime in the spring would be appropriate,
15:16:38 13 and my impression is that the plaintiffs do not agree with
15:16:42 14 that.

15:16:42 15 MR. O'BEIRNE: We did our best, Your Honor, before
15:16:44 16 the conference to try to see what we could agree on as far as a
15:16:47 17 schedule and what we thought the case would take, and I think
15:16:50 18 the parties agree the current fact and expert and dispositive
15:16:54 19 motions schedule is fine. And, from our standpoint, as
15:16:58 20 Your Honor already said, 90 to 120 days in excess of that would
15:17:02 21 put us in December and January. We think that's plenty of
15:17:04 22 time. I think that addresses the concerns that counsel is
15:17:07 23 raising. If that's the first time the Court thinks would make
15:17:10 24 sense, we would go for that.

15:17:12 25 MR. RAVEL: The only thing that I think is being

15:17:13 1 missed there is that there is likely going to be a
15:17:15 2 Judge Austin-Judge Yeakel procedure, and that these are not
15:17:18 3 going to be motions that you're going to decide in the first 15
15:17:22 4 days you get them. So I think we have a disagreement.

15:17:24 5 THE COURT: But that's right. But the 90 to 120 days
15:17:30 6 is for me. You plan on your going to trial and, if it goes
15:17:34 7 away because you get a ruling on a dispositive motion somewhere
15:17:38 8 in that 90 to 120 days, so be it. But it's ready to go as soon
15:17:45 9 as I rule on the dispositive motion. I don't share your
15:17:47 10 concern about, you know, even if I send the next round to
15:17:52 11 Judge Austin, it just means that you-all have time to file,
15:17:59 12 which you will, because they're called dispositive motions, so
15:18:01 13 somebody is going to object to the report and recommendation
15:18:05 14 and then I'll go through the record. But that's already kind
15:18:09 15 of built into that 90 to 120 days.

15:18:11 16 MR. RAVEL: So we think the appropriate time is April
15:18:14 17 for May, and they think the appropriate time is what for what?

15:18:18 18 MR. O'BEIRNE: December for January.

15:18:19 19 THE COURT: Well, I'm going to go with December and
15:18:22 20 January if the only argument is you don't think the 90 to 120
15:18:26 21 days from the dispositive motions deadline is adequate time for
15:18:31 22 either me, or me in conjunction with Judge Austin, to get it
15:18:35 23 done. I can be ready to try this case in December.

15:18:42 24 So, you know, unless you have an agreement to the
15:18:44 25 contrary, I'm going to put it on what my usual schedule would

15:18:47 1 be, which is the December-January time line, based on the date
15:18:56 2 you tell me will be the last date that I will get dispositive
15:18:58 3 motions, if I get any, which is July 20th.

15:19:04 4 MR. O'BEIRNE: Plaintiffs share that position,
15:19:05 5 Your Honor.

15:19:05 6 THE COURT: All right. Then that's what we're going
15:19:07 7 to do. I'm not going to kick it off more down the line unless
15:19:11 8 you-all can agree on it. And, since you haven't, you've missed
15:19:14 9 the window of opportunity.

15:19:18 10 All right. So I'm going to schedule you for a final
15:19:20 11 pretrial conference on December the 14th, 2018 at 4 p.m. and a
15:19:32 12 jury trial in January 2019.

15:19:37 13 Now, I'm going to write and talk at the same time
15:19:44 14 here. I'm sure you-all recognize what I'm doing by putting
15:19:51 15 this on my calendar and, in a moment, signing the scheduling
15:19:54 16 order is I'm triggering the filing of all of your pretrial
15:20:03 17 filings that are required of both the local rule and general
15:20:08 18 federal rules of civil procedure. So, if you have not walked
15:20:16 19 through those rules recently, you should do so, so that you
15:20:19 20 have them fixed in your mind, because I'll head off a phone
15:20:25 21 call and tell you: Yes, I do expect you to strictly adhere to
15:20:28 22 those pretrial filing deadlines.

15:20:34 23 And you're going to find that most of what you need
15:20:36 24 to file are found in our local rule CV-16. Some are in other
15:20:41 25 local rules, some are in the general federal rules, but most

15:20:50 1 are in CV-16 and most of the deadlines come 14 days in advance
15:20:53 2 of your final pretrial conference. Some a little before that,
15:20:55 3 some a little later, but most of them are 14 days. And, so, if
15:20:59 4 you have "CV-16" and "14 days" kind of fixed in your mind, you
15:21:06 5 won't be far off.

15:21:14 6 Now, let me say a little bit about your filings. One
15:21:24 7 of the things you have to file is an estimate of how long it
15:21:27 8 will take you to try this case. For some reason lawyers have a
15:21:33 9 hard time understanding -- I'm not suggesting that you-all
15:21:38 10 would fall in that category -- what that rule says. So let me
15:21:41 11 tell you what it means.

15:21:44 12 It doesn't mean that the plaintiff takes a stab at
15:21:48 13 how long the plaintiff thinks it will try the case -- take to
15:21:52 14 try the case and then the defendant takes a stab, and I look at
15:21:55 15 these two disparate numbers and try to figure out what you're
15:22:02 16 really talking about. It doesn't mean that the plaintiff tells
15:22:06 17 me how much time the plaintiff needs for its case and then the
15:22:08 18 defendant tells me how much time it needs. It requires you-all
15:22:11 19 to sit down and talk about this before you do your pretrial
15:22:13 20 filings. What I want is for you to talk about this case and
15:22:17 21 collectively determine how long you think would be a reasonable
15:22:20 22 period of time to allocate to try it.

15:22:23 23 And so I want the same number in both sides' pretrial
15:22:29 24 filings, and I want it to be your estimate of how long it will
15:22:33 25 take to try the entire case from beginning of voir dire to end

15:22:37 1 of closing arguments.

15:22:38 2 Now, that's important because, when you come for your
15:22:41 3 final pretrial conference, we're going to talk about how much
15:22:44 4 time you get to try your case. I will put you on a clock. And
15:22:47 5 there are going to be -- as we discuss how much time you're
15:22:51 6 going to get, there will be three components that I'm going to
15:22:54 7 consider.

15:22:54 8 One is your joint estimate of how long you think it
15:22:57 9 will take to try the case. It's important to me.

15:23:00 10 Secondly, I will have looked at your final pretrial
15:23:04 11 filings, which is why I want everything in timely. And I would
15:23:08 12 have paid particular attention to your final trial pleadings,
15:23:12 13 your exhibit lists, and your witness lists and I would have
15:23:15 14 made some kind of seat-of-my-pants guess as to how complicated
15:23:19 15 I think this case is likely to look to the jury.

15:23:25 16 And then third, and probably most important, is I'm
15:23:28 17 going to look at similar cases in my court that have been well
15:23:35 18 tried and how long they took. I've got some background there
15:23:38 19 because this is a copyright infringement case; it's not like I
15:23:43 20 haven't seen any before. But, when you leave your final
15:23:45 21 pretrial conference, you'll know how much time you get to try
15:23:48 22 your case.

15:23:49 23 Now, let me tell you a few things that will help you
15:23:51 24 in that regard. One, take advantage of our local rule that
15:23:55 25 allows you to stipulate facts. Lawyers can always stipulate to

15:23:59 1 more things than they think they can. And I'm not suggesting
15:24:05 2 that anybody stipulate away something that is important to the
15:24:08 3 outcome of your case. But in every case there are any number
15:24:11 4 of small matters that are susceptible to very easy proof that
15:24:14 5 one side or the other needs to get into the record to preserve
15:24:18 6 the record or protect the record which are not of such a major
15:24:22 7 consequence you're ever going to argue them to the jury. Those
15:24:25 8 are things you ought to stipulate to. Those little things will
15:24:28 9 add up and will save you a lot of time on your clock, because
15:24:33 10 I'll read your stipulated facts to the jury at the beginning of
15:24:36 11 trial before the clock goes on and they will already be in
15:24:39 12 evidence, so you're not going to have to go about proving them
15:24:42 13 all over again.

15:24:43 14 Also, sit down with one another before your final
15:24:50 15 pretrial conference and go over your exhibits and exhibit
15:24:53 16 lists. And, to the extent you know that your opponent is going
15:24:55 17 to be clever enough to get an exhibit into evidence, don't have
15:24:57 18 an objection to it. You're not bound by it just because it's
15:25:01 19 in evidence. You can argue its weight all you want, but you
15:25:04 20 will save yourself untold amounts of time if you don't require
15:25:09 21 each other to sponsor every exhibit in front of a witness,
15:25:14 22 particularly, those that you know that you're not going to
15:25:16 23 object to. So do that.

15:25:19 24 Don't do anything fancy on this. Don't renumber your
15:25:21 25 exhibits and give me a new list that says "agreed exhibits" and

15:25:24 1 "objected-to exhibits." You don't need to run it through a
15:25:27 2 word processor. Don't prefile anything.

15:25:30 3 One of you just take notes when you're having your
15:25:32 4 conversation. And then at the final pretrial conference, just
15:25:37 5 bring me a note that can be handwritten that says, "Plaintiff
15:25:40 6 has no objection to the admissibility of the following
15:25:43 7 Defendant's exhibits," and just give me the numbers of them.
15:25:47 8 You don't even have to describe them. And the next line will
15:25:50 9 be, "Defendant has no objection to the admissibility of the
15:25:53 10 following Plaintiff's exhibits," and give me the numbers. And
15:25:57 11 I will admit those exhibits *en masse* at the beginning of trial,
15:26:00 12 and it will save you a lot of time.

15:26:02 13 Now, here's the biggest thing. You need to listen up
15:26:07 14 right now because it's very important, and it's something
15:26:08 15 you're not going to find written down anywhere because I've
15:26:12 16 never gotten around to doing a standing order on it.

15:26:15 17 But the rules provide that each side will provide its
15:26:19 18 proposed findings of fact and conclusions of law -- pardon
15:26:24 19 me -- I mean, jury instructions and questions 14 days in
15:26:28 20 advance of your final pretrial conference and you do it
15:26:32 21 separately. The change is: I want an agreed charge in this
15:26:36 22 case 14 days before your final pretrial conference.

15:26:39 23 Now, it's a copyright infringement case. There's a
15:26:43 24 lot of charge materials out there. I feel like all of you
15:26:45 25 undoubtedly have many of them in your files at your law firms.

15:26:51 1 There's any number of pattern jury charges out there. The
15:26:54 2 easiest thing we should have to do in this case is to decide
15:26:57 3 how we're going to get it to the jury.

15:26:59 4 You're in federal court; you're not in state court.
15:27:02 5 There's not a charge "gotcha" practice. You can go into any
15:27:06 6 lawyer's law firm library that still has books and randomly
15:27:09 7 select a year, and you're going to find many, many fewer charge
15:27:15 8 cases in the entire Federal Reporter system for all of the
15:27:18 9 circuits for any year than you're going to find in the Texas
15:27:21 10 cases in state court. Very few federal civil cases get to a
15:27:28 11 circuit on charge error. It's a really high bar.

15:27:32 12 The standard in the Fifth Circuit is there must be
15:27:37 13 ineradicable evidence that I have erred in submitting my
15:27:40 14 charge. I submit to you that is a high bar. If you can even
15:27:43 15 pronounce the word, it's a high bar. So I'm not too concerned
15:27:51 16 about charge error; neither should you be. So start working on
15:27:54 17 your charge early. The next year is going to go by quickly.

15:27:57 18 I always learned as a young lawyer that the first
15:28:01 19 thing you do when you get a case is to prepare the charge and
15:28:04 20 then you can adjust it as you go along, but it gives you a good
15:28:08 21 road map as to what you're going to do. I feel certain that at
15:28:11 22 least some of you received that same training, and I also feel
15:28:15 23 certain that, like me, you've never done that a single time in
15:28:18 24 a jury case you ever had. But it doesn't mean that it was not
15:28:23 25 good advice when you got it.

15:28:25 1 But don't put it off. Get started on it. Start
15:28:27 2 exchanging your charge materials now, because I'm quite serious
15:28:34 3 that we have this done before trial.

15:28:35 4 Now, I don't do this to give you busy work. I do it
15:28:38 5 for two reasons. One is, once both sides have rested and
15:28:44 6 closed, I don't like to keep jurors cooling their heels while
15:28:47 7 we spend very much time on a charge; and, secondly, I do charge
15:28:50 8 my juries before you argue. So the earliest that I can get the
15:28:55 9 charge in your hands that looks pretty much like the one I'm
15:28:57 10 going to submit, the easier it is on you.

15:29:00 11 In the off chance that you cannot agree to
15:29:02 12 everything, questions and instructions, then I want what you
15:29:07 13 can agree on in agreed form and I want your areas of
15:29:11 14 disagreement, with specificity. And I mean specificity. I
15:29:17 15 want to know everything about your disagreement, and I want
15:29:20 16 both sides' positions supported by authorities. You don't have
15:29:23 17 to give me authorities on what you agree on. But I really
15:29:26 18 don't think we're going to get that far, and I'll be
15:29:29 19 disappointed if we do.

15:29:30 20 Now, that having been said, you can change any date
15:29:34 21 in this scheduling order by agreement except for your final
15:29:38 22 pretrial conference date and time and your trial month. And by
15:29:42 23 agreement, I mean agreement. It's the only way you can change
15:29:45 24 it. I don't want to see a motion for additional time. I don't
15:29:49 25 want to see a motion to modify the scheduling order. In fact,

15:29:53 1 even if you disagree, I don't want to see a motion. I have
15:29:56 2 better things to do than micromanage you. If you need to
15:30:00 3 change some of these dates within the scheduling order, just do
15:30:04 4 it by agreement.

15:30:06 5 I expect you-all to demean yourselves like the
15:30:09 6 professionals you are and to make reasonable accommodation to
15:30:12 7 one another to get this case moved along.

15:30:14 8 Let me caution you about a couple of things, though.
15:30:18 9 If you think you have an agreement, be sure you have an
15:30:20 10 agreement. I'm not going to get into a he said, she said. If
15:30:24 11 there is a disagreement over an agreement, the dates in the
15:30:28 12 scheduling order are going to control.

15:30:30 13 Secondly, if you truly believe that you can get a
15:30:33 14 dispositive motion granted, another round of them, it's not a
15:30:40 15 good idea to change your dispositive motions deadline. I'm not
15:30:43 16 going to tell you you can't do it, but I need all of the time
15:30:45 17 for all of the reasons that I've told you to deal with
15:30:48 18 dispositive motions.

15:30:49 19 And so be forewarned that, if you change that date,
15:30:55 20 the closer you move it to your trial month, the less likely you
15:30:58 21 are I will take up your dispositive motions prior to trial and
15:31:03 22 the more likely you are I will carry them through trial.
15:31:07 23 Because, if you move that date and I don't get to your
15:31:08 24 dispositive motions, I'm not going to put your trial off so I
15:31:11 25 can get to them.

15:31:12 1 Also, if you intend to call expert witnesses, it's
15:31:17 2 not a good idea to change your expert witness date, which is
15:31:21 3 those dates to designate experts, exchange reports, take expert
15:31:25 4 depositions, and to file your Rule 702 or *Daubert* motions.

15:31:29 5 Again, I'm not going to tell you you can't do it; but
15:31:32 6 I like to deal with objections to experts early on so, if I
15:31:38 7 sustain one and strike your expert, you have time to file a
15:31:41 8 motion to try to convince me to let you designate a new expert.
15:31:45 9 There's no guarantee that I'm going to grant that motion, but I
15:31:48 10 like to give you that opportunity. If I'm dealing with Rule
15:31:50 11 702 or *Daubert* motions just before trial and I grant one,
15:31:56 12 you're just out of luck because, again, I'm not going to put
15:31:59 13 your trial off to let you seek a new expert.

15:32:02 14 On the question of experts, do not put anything in a
15:32:07 15 motion in limine about an expert. Objections to experts in
15:32:10 16 motions in limine come way too late in the case, and I'm not
15:32:13 17 going to consider them. If you've got a problem with your
15:32:18 18 opponent's expert, as soon as you know you have that problem,
15:32:21 19 get a motion out on the table and I will deal with it.

15:32:24 20 And on the topic of motions in limine, do not submit
15:32:29 21 me lengthy motions in limine. Lawyers have gotten way too
15:32:32 22 proud of the motion in limine that lives in their word
15:32:34 23 processor and gets bigger and fatter with every case that they
15:32:37 24 try.

15:32:37 25 The sole purpose of a motion in limine is to exclude

15:32:43 1 testimony and questions that are so highly inflammatory or
15:32:45 2 prejudicial they can't be cured by an objection or instruction
15:32:48 3 to disregard. I have yet to see the case that has more than
15:32:54 4 two or, at the outside, three of those highly inflammatory or
15:32:57 5 prejudicial matters.

15:32:58 6 So don't give me motions in limine that have
15:33:01 7 paragraphs in them that say things like, "Don't let my opponent
15:33:04 8 call witnesses that aren't on the witness list"; "Don't let my
15:33:07 9 opponent ask questions that would elicit hearsay"; "Don't let
15:33:11 10 my opponent ask questions about matters that haven't been
15:33:13 11 pleaded."

15:33:17 12 Ninety-nine percent of what I see in motions in
15:33:19 13 limine don't have any place in a motion in limine. So limit
15:33:22 14 your motions in limine to only those highly or prejudicial
15:33:25 15 matters -- highly prejudicial matters or inflammatory matters
15:33:31 16 that can't be cured by an objection or instruction to
15:33:33 17 disregard.

15:33:34 18 If I see a lengthy motion in limine -- one of those
15:33:37 19 10-, 15-, 20-paragraph motions -- I'm not going to read it.
15:33:40 20 I'm just going to overrule the entire thing, and your good
15:33:44 21 stuff that may be hidden in there gets thrown out with your bad
15:33:47 22 stuff and we'll take everything up in front of the jury as it
15:33:51 23 progresses. So restrict your motions in limine.

15:33:54 24 Now, I think you can tell that my rules are pretty
15:33:57 25 straightforward. In addition to making reasonable

15:33:59 1 accommodation to one another and demeaning yourselves like the
15:34:02 2 professionals you are, you need to understand that you only
15:34:06 3 have one role in this case, and that's to resolve it. And you
15:34:10 4 can do it in one of three ways: You could settle it or I could
15:34:14 5 grant a well-taken dispositive motion -- just because I don't
15:34:19 6 like them, doesn't mean that I don't consider them, and it
15:34:21 7 doesn't mean that I don't grant them when they are well
15:34:24 8 taken -- or you can try the case.

15:34:25 9 And I don't care which of the three it is. I like to
15:34:28 10 try lawsuits. I'm not going to get you in here for your final
15:34:32 11 pretrial conference and knock you around about why you haven't
15:34:35 12 settled and try to talk you out of your trial. I will ask you
15:34:38 13 if you've made a good-faith effort to settle this case and, in
15:34:42 14 your best professional judgment, it can't be settled. And your
15:34:45 15 answer needs to be "yes," because settlement is generally in
15:34:48 16 the best interest of the client because it changes the unknown
15:34:51 17 for the known.

15:34:52 18 But I was on your side of the bench long enough to
15:34:55 19 know that every case can't be settled. So if you just give me
15:34:59 20 your assurances that you've made that good-faith effort and it
15:35:03 21 can't be settled, I'm going take you at your word and we'll go
15:35:07 22 to trial.

15:35:07 23 So another reason I conduct these conferences is I
15:35:11 24 like to get the lawyers together before too much water has gone
15:35:14 25 under the bridge to find out if you have any questions about me

15:35:19 1 or my staff or the way I run my court, anything that might be
15:35:22 2 helpful to you, anything that can make your life easier between
15:35:27 3 now and the end of trial.

15:35:30 4 I start with the plaintiffs. So does the plaintiff
15:35:34 5 have any questions, anything I've left out, anything you-all
15:35:37 6 want to know?

15:35:39 7 MR. O'BEIRNE: Your Honor, there is a lot in here,
15:35:41 8 Your Honor, for us to keep in mind and we really appreciate you
15:35:44 9 laying this out with such clarity. I think, you know ...

15:35:46 10 MR. BITTING: Do you -- Judge, do you have policies
15:35:49 11 on contacting the law clerk on this case?

15:35:51 12 THE COURT: Yeah. I don't have any problem with it.
15:35:53 13 The law clerk on your case is Katherine Baffes, B-a-f-f-e-s.
15:35:57 14 You may call her or any of my clerks and ask them routine
15:36:03 15 questions, procedural questions, the way we like to see things.

15:36:07 16 Do not *ex parte* her or any of my clerks. And you
15:36:10 17 don't need my lecture what *ex parte*-ing is. If you do, you can
15:36:14 18 get put on the "may not call chambers list." And I've now been
15:36:18 19 doing this for a little over 14 years, and nobody has gotten on
15:36:21 20 that list. So if you've always aspired to be first at
15:36:24 21 anything, just overstay your welcome with my law clerks --
15:36:28 22 because, amazingly, they tell me about your conversations and I
15:36:31 23 know what you've asked them or tried to do with them -- and I
15:36:34 24 can accommodate you by putting your number on that list.

15:36:41 25 I know I have colleagues that don't allow calls to

15:36:44 1 chambers, and I've never understood that -- I think they must
15:36:45 2 have too much free time on their hands -- because it's just
15:36:48 3 easier, if you have a routine question about the form of
15:36:49 4 something or the way we like to see something, if you can just
15:36:54 5 call and get your question answered.

15:36:56 6 MR. RAVEL: I have one, Judge.

15:36:57 7 THE COURT: All right.

15:36:58 8 MR. RAVEL: To help me do my job of telling people
15:37:02 9 who I represent how you feel about dispositive motions, what
15:37:07 10 has become of the Tennessee Orange "No Smoking. No Dispositive
15:37:12 11 Motions" placard?

15:37:14 12 THE COURT: It's right behind you.

15:37:14 13 MR. RAVEL: Oh, okay. All right. Thank you.

15:37:17 14 THE COURT: See you just took the wrong chair. That
15:37:20 15 was given to me by previous court reporter who had heard --
15:37:23 16 Arlinda is still figuring out what she's going to give me --
15:37:27 17 that heard my lectures so much about this, that that came up.
15:37:29 18 So it's there. It is alive and well.

15:37:35 19 MR. RAVEL: Would it violate the local rules if I
15:37:38 20 took a snapshot of it before I left?

15:37:41 21 THE COURT: You may do that.

15:37:41 22 MR. RAVEL: Thank you, Judge.

15:37:41 23 THE COURT: Any other questions?

15:37:42 24 MR. HOWENSTINE: No. Thank you, Your Honor. I think
15:37:43 25 you've covered everything we might ask.

15:37:45 1 THE COURT: If you don't settle and if you don't
15:37:47 2 consent to a magistrate judge, I look forward to having you
15:37:50 3 back here in a year and trying a lawsuit with you.

0:0:0 4 (End of transcript)

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1 UNITED STATES DISTRICT COURT)

2 WESTERN DISTRICT OF TEXAS)

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States.

10 WITNESS MY OFFICIAL HAND this the 15th day of
11 February 2018.

12

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